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IN THE

Supreme Court of the United States

October Term, 1960.

No. 584.

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. and STONE'S EXPRESS, INC.,

Plaintiffs-Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS and PARCEL DELIVERY SERVICE, INC.,

Intervening Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,

Defendants-Appellees,

UNITED PARCEL SERVICE, INC.,

Intervening Defendant-Appellee.

On Appeal From the United States District Court for the Southern District of New York.

MOTION TO AFFIRM.

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INDEX.

	Page
STATEMENT	2
ARGUMENT	8
1. The Commission Properly Refused to Withhold the Certificate Pending Determination of Appellants' Complaint Filed Under Section 5	8
2. There Was No Violation of Section 221(b)	13
3. The Commission's Detailed Findings of Convenience and Necessity and of Fitness and Ability Are Fully Supported	15
4. The Authorization of Dual Operations Under Section 210 Was Proper	18
CONCLUSION	19

TABLE OF CASES CITED.

Page

Callahan Road Improvement Co. v. United States, 345 U. S. 507 (1953) 13

Commissioner v. South Texas Lumber Co., 333 U. S. 496 (1948) 15

Greyhound Mergers, 1936, 1 M. C. C. 342 10

Pan American Airways Co. v. Civil Aeronautics Bd., 121 F. 2d 810 (2d Cir. 1941) 11

Railway Express Agency, Inc. v. United States, 355 U. S. 270 (1957), affirming per curiam 153 F. Supp. 738 (S. D. N. Y. 1957) 2, 12, 16

Schwerman Trucking Co.—Control—Schwerman Trucking Co. of Texas, 80 M. C. C. 382 (1959) 10, 11, 12

United Parcel Service of Pennsylvania, Inc., Contract Carrier Application, 10 M. C. C. 83 (1938) 12, 13

United Parcel Service of Portland—Purchase—A. J. Wiese, 37 M. C. C. 474 (1941) 10, 12

United States v. Los Angeles & Salt Lake R. R., 273 U. S. 299 (1927) 14

United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515 (1946) 18

Venner v. Michigan Central R. R., 271 U. S. 127 (1926) 13

TABLE OF STATUTES CITED.

Page

Interstate Commerce Act:

Section 5, 49 U. S. C. § 5 ..... 4, 5, 8, 9, 10, 11, 12, 13

Section 5(7), 49 U. S. C. § 5(7) 9

Section 17(4), 49 U. S. C. § 17(4) 14

Section 17(8), 49 U. S. C. § 17(8) 14

Section 17(9), 49 U. S. C. § 17(9) 14

Section 203(16), 49 U. S. C. § 303(16) 12

Section 210, 49 U. S. C. § 310 ..... 6, 18, 19

Section 221, 49 U. S. C. § 321 ..... 13, 15

Section 221(b), 49 U. S. C. § 321(b) 6, 7, 13

Judicial Code:

Sections 2284, 2325, 28 U. S. C. §§ 2284, 2325 2

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OCTOBER TERM, 1960.

No. 584.

YALE TRANSPORT CORP., EMPIRE CARRIERS CORP. AND STONE'S EXPRESS, INC.,
Plaintiffs-Appellants,

RAILWAY EXPRESS AGENCY, INCORPORATED, BILKAYS EXPRESS CO., JERSEY COAST FREIGHT LINES, INC., MAHON'S EXPRESS AND PARCEL DELIVERY SERVICE, INC.,
Intervening Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees,

UNITED PARCEL SERVICE, INC.,
Intervening Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM.

United Parcel Service, Inc., Intervening Defendant-Appellee, pursuant to Rule 16(1)(c) of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed.

STATEMENT.

This is an appeal from a final judgment entered pursuant to the unanimous opinion of a three-judge court, constituted pursuant to 28 U. S. C. §§ 2284, 2325, refusing to set aside an order of the Interstate Commerce Commission pursuant to which a certificate of public convenience and necessity had been granted to Intervening Defendant-Appellee, United Parcel Service, Inc. (herein "UPS")..

This certificate authorized UPS to render a unique package delivery service which has already been fully described to this Court in an appeal from an earlier decision of the same district court involving a different territory. **Railway Express Agency, Inc. v. United States**, 355 U. S. 270 (1957), *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957).

The instant proceeding began with the application of UPS to the Interstate Commerce Commission for a certificate to operate as a common carrier by motor vehicle of general commodities, with certain exceptions including weight and size restrictions, from the New York City metropolitan area and from the Boston metropolitan area to all points in a territory embracing the states of Connecticut, Rhode Island and Massachusetts and parts of New Jersey, New York, Vermont, New Hampshire and Maine (the latter three states to be served only from the Boston origin area).

After 49 days of hearings, on a record of over 7000 pages and 550 exhibits, the Examiner issued his proposed report, following which exceptions, and briefs thereon, were filed by the parties. Thereafter, on June 3, 1959, upon consideration of the exceptions to the Examiner's report, the Commission, by Division 1, issued its report and order granting the authority to UPS which is here challenged. 79 M. C. C. 629-663. In its comprehensive report, the Commission, after fully discussing the several exceptions to the Ex-

aminer's proposed report, made the following ultimate findings (79 M. C. C. at 657):

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of the commodities, between, from, and to the points, and in the manner and subject to the restrictions and conditions as described in appendix C hereto; that applicant is fit, willing, and able, properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that an appropriate certificate should be issued; and that the application in all other respects should be denied.
>
> "We further find that the holding by applicant of the certificate herein granted and the holding by it and its affiliates of the permits heretofore issued to them, will be consistent with the public interest and the national transportation policy."

At that late stage in the proceeding, certain of the appellants for the first time sought to inject into the case, by two related maneuvers, an alleged question of unlawful control in the United Parcel Service family. First, on August 21, 1959, these appellants sought to defeat the issuance of the certificate by moving for a stay of the proceedings until the alleged question of unlawful control had been determined. Then, on August 25, 1959, these appellants filed a complaint with the Commission in Docket No. MC-F-7321 alleging that UPS (a New York corporation), its parent United Parcel Service of America, Inc. (herein "UPSA"), and an affiliated carrier, United Parcel Service,

Inc. (an Ohio corporation), were in violation of section 5 of the Interstate Commerce Act.[1]

The full Commission, on February 4, 1960, dismissed the motion for a stay of these proceedings, and at the same time overruled and denied all petitions for reconsideration of its order of June 3, 1959.

On March 2, 1960, upon defendants' motion, the Commission, by Division 4, dismissed the complaint in Docket No. MC-F-7321. On September 9, 1960, the full Commission denied appellants' petition for reconsideration of its dismissal of the complaint (J. St. 51-52). No appeal was taken from that action of the Commission. Consequently, the control relationships in the United Parcel Service family stand fully and finally vindicated and approved on the merits **in a section 5 proceeding** instituted by three of the appellants—a **control proceeding** in which they raised by direct attack all of the same contentions they would now collaterally raise before this Court **in a certificate case.**

The certificate authorized by the order dated June 3, 1959 (petitions for reconsideration and stay of which were dismissed by order dated February 4, 1960) was issued on March 9, 1960. UPS thereupon commenced full operations as permitted and required by the certificate.

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[1] Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5, provides *inter alia:*

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) * * * for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * *

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof * * *. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. * * *"

On March 15, 1960, appellants instituted the present action in the United States District Court for the Southern District of New York, seeking to have set aside and enjoined the Commission's order of February 4, 1960, and seeking to have the certificate declared null and void. In this action, appellants did not deny that there is an almost unlimited number of manufacturers, wholesalers and commercial shippers generally engaged in inter-business distribution, having places of business in the New York and Boston origin areas, who were using United States parcel post as their normal transportation medium for small package shipments. Appellants further did not challenge the Commission's finding that parcel post service falls far short of meeting the business needs of these small package shippers (79 M. C. C. at 651). Finally, appellants did not challenge the finding that the service rendered by UPS is far superior to parcel post in all respects, and removes the problems and service deficiencies of parcel post of which so many manufacturers and other wholesalers so earnestly complain. 79 M. C. C. at 649.

Rather, appellants directed their principal attack against the Commission's order on technical and collateral issues.

First, appellants asserted that there was a control relationship between UPS, UPSA and affiliated carriers which had not been approved under section 5 of the Interstate Commerce Act, and that such approval was a condition precedent to the granting of a certificate in this case.

By its order of February 4, 1960, denying the motion for a stay, the Commission determined that the resolution of any question of a possible improper control relationship in the United Parcel Service family is not a condition precedent to the issuance of a certificate in this case. Furthermore, by its order of March 2, 1960, dismissing appellants' section 5 (control) complaint in Docket No. MC-F-7321, and its order of September 9, 1960, denying reconsideration of that order, the Commission has found that there is no

unlawful control relationship among the members of the United Parcel Service family (J. St. 51-52).

As a second procedural attack on the order of the Commission denying reconsideration in this proceeding, appellants argued that the order and the certificate were allegedly made effective too soon in violation of section 221(b) of the Interstate Commerce Act, 49 M. C. C. § 321(b).

Appellants also made the usual attack against the Commission's exercise of its traditional fact finding function, asserting that there was not substantial evidence to support the Commission's findings of fact (1) that the respective services of appellants and other protestants below do not provide a reasonable and practical alternative to parcel post, so that there is need for the service of UPS, and (2) that UPS' service will not divert so much business from appellants and the other protestants as to impair their operations and deprive the public of their services.

Finally, appellants asserted that the Commission also erred in concluding, pursuant to the broad authority delegated to it by section 210 of the Act, 49 U. S. C. § 310, that the holding by UPS of both a common carrier certificate and a contract carrier permit, subject to the conditions imposed, would be consistent with the public interest and with the national transportation policy.

The three-judge statutory court below, in a detailed and well reasoned opinion by Circuit Judge Friendly, reported at 185 F. Supp. 96, unanimously dismissed the complaint (J. St. 23-44), holding that:

1. The findings of fact of the Commission, with respect both to convenience and necessity and to fitness and ability, were supported by substantial evidence on the whole record (J. St. 30-33).

2. With the additional restrictions imposed by the Commission on the authority granted to UPS, the Commission properly exercised its discretion under section 210 of the Act in finding that the proposed dual operations would be

consistent with the public interest and the national transportation policy (J. St. 34-35).

3. There was no unlawful control relationship in the United Parcel Service family which would bar the issuance of a certificate to UPS (J. St. 36-40).

4. Appellants' contentions that the certificate was issued too soon in violation of section 221(b) of the Act were without merit (J. St. 41-43).

ARGUMENT.

The unanimous decision of the court below, approving the issuance of a motor carrier certificate of public convenience and necessity to UPS after lengthy proceedings before the Commission and a full presentation of all contentions before the court, is clearly correct under the provisions of the Interstate Commerce Act, the governing case law, and long established administrative practice.

1. The Commission Properly Refused to Withhold the Certificate Pending Determination of Appellants' Complaint Filed Under Section 5.

In this appeal, appellants seek to set aside the grant of a certificate of public convenience and necessity. But appellants' principal attack is not directed against the findings which form the basis of the Commission's grant of the certificate. Rather, appellants' main argument is that the three-judge court below erred in upholding the Commission's refusal to grant appellants' motion requesting a stay of all proceedings herein until asserted improper control relationships allegedly existing between members of the United Parcel Service family were investigated and their propriety determined by the Commission.

These same allegations of allegedly unlawful control were directly raised in a complaint proceeding, and have now been finally rejected by the Commission in Docket No. MC-F-7321 (see note 2 at pp. 9-10 below, and J. St. 51-52). Appellants' failure to appeal the Commission's decision on the merits in that complaint proceeding, where the control issues are directly raised, is entirely inconsistent with appellants' position in this certificate case, where the asserted control questions are at best only collateral issues. Having abandoned their direct action, appellants nevertheless press their collateral attack in this court following its rejection by a unanimous three-judge court below.

Appellants' only allegation of unlawful control with respect to UPS or the territory embraced in this proceeding is that the acquisition by UPS, a contract carrier, of additional common carrier authority—as a result of the Commission's action in this case—constitutes the acquisition of a new "carrier" by its parent, UPSA. Appellants then argue from this proposition that the certificate could not be lawfully issued to UPS until such acquisition has been approved in a control proceeding prosecuted under section 5 of the Interstate Commerce Act, 49 U. S. C. § 5. In addition, appellants go beyond the grant of authority to UPS in this case by attacking, as unlawful, intercorporate relationships which have existed for as long as 20 years between UPSA and other affiliated companies in the United Parcel Service group of carriers.

Significantly, these asserted control issues were never mentioned until August 21, 1959, nearly three years after UPS' application was filed and nearly three months after the order of the Commission was issued granting the requested authority. At that late date, appellants filed a motion with the Commission for a stay of proceedings pending action on a complaint against UPS, UPSA and an affiliated Ohio corporation which appellants intended to file under section 5(7) of the Interstate Commerce Act, 49 U. S. C. § 5(7). The complaint, docketed in No. MC-F-7321, was later filed on August 25, 1959, more than two years after a full disclosure of the entire corporate relationship between UPS, UPSA and other affiliated carriers had been made in the hearings in this case (79 M. C. C. at 632-634).

The control issues thus raised by appellants were obviously an afterthought. There was no substance to the charges made in the complaint and, on motion of the defendants named therein, the Commission dismissed the complaint.[2] In so doing, and later on September 9, 1960, in

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2. In its order of March 3, 1960, dismissing the complaint in Docket No. MC-F-7321, the Commission found as follows: "That control of the defendant motor carriers in a common

denying reconsideration of its order dismissing the complaint (J. St. 51-52), the Commission found that the control of UPS in a common interest with other United Parcel Service companies was not in violation of section 5, and that institution of an investigation into the allegedly improper control relationship between UPSA and other subsidiary carriers would be unreasonable.

That determination by the Commission, in a complaint proceeding in which the control questions were directly raised and considered, demonstrates the unsupportability of appellants' contentions here.

Wholly independent of the Commission's action in the control proceeding, the court below also considered appellants' claims of illegal control and found them completely without merit. Moreover, the court upheld the Commission's position that determination of the propriety of the control relationships was not a condition precedent to the grant of a certificate to UPS. The court thus concluded—as did the Commission in the section 5 proceeding—that there is no unlawful control relationship in the United Parcel Service family which requires approval by the Commission (J. St. 38-40).

If it be assumed, *arguendo*, that the acquisition of the certificate by UPS in this case invoked section 5, even then appellants' motion to stay these proceedings would not be

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interest preceded the effective date of the Motor Carrier Act, 1935, and did not require approval of the Commission, *Greyhound Mergers*, 1936, 1 M. C. C. 342, 352; that no change in the control is alleged, except the change in form approved and authorized in *United Parcel Service of Portland-Purchase-Wiese*, 37 M. C. C. 473; that each of the defendant motor carriers holds authority to operate as a contract carrier and none has or would become a carrier for the first time as a result of the granting of authority to operate as a common carrier, distinguishing *Schwerman T. Co. —Control—Schwerman T. Co., of Texas*, 80 M. C. C. 382; that the granting of additional rights to an existing carrier, whether of the same type or a different category from those previously held, is not the acquisition of control of 'another carrier' within the meaning of section 5(2) [citing five cases]."

justified, for, as Judge Friendly pointed out in his opinion for the court below, **Pan American Airways Co. v. Civil Aeronautics Bd.**, 121 F. 2d 810 (2d Cir. 1941), teaches that the certificate could issue before a control proceeding is held (J. St. 36-38). But this issue does not arise here, since appellants' allegations with respect to UPS do not present any section 5 question in the first place.

A brief examination of appellants' contentions with respect to alleged violations of section 5 will show why the Commission was correct in refusing to grant a stay in this case, why the court below was correct in rejecting appellants' attack under section 5, and why appellants' arguments present no substantial question to this Court.

Appellants concede that because UPS holds contract carrier rights under the "grandfather" provision of the Interstate Commerce Act, and control by the same non-carrier parent existed prior to the enactment of Part II of that Act, approval of continued control of UPS by UPSA was not required under section 5 of the Act (J. St. 5-6). However, appellants seek to circumvent this accepted rule by the contention that when a contract motor carrier, such as UPS, first acquires common motor carrier rights, it somehow thereby becomes a new "carrier," therefore requiring a control application under section 5 before the common carrier certificate may be granted.

Both the Commission and the court below found this contention utterly lacking in merit. Appellants' only alleged authority for their proposition is **Schwerman Trucking Co. —Control—Schwerman Trucking Co. of Texas**, 80 M. C. C. 382 (1959). But that case involved a grant of new operating authority as a contract carrier to a corporation which previously had held neither contract nor common carrier rights; it had held no carrier rights whatever. **Schwerman** certainly is not applicable here, merely because common carrier authority was granted to UPS, which was **already a carrier** by virtue of its previously held contract carrier permit. **Schwerman** is so clearly distinguishable from the

present situation that no construction or interpretation is needed for this purpose. But beyond the decision itself, the Commission has unequivocally stated that its own decision in **Schwerman** is wholly inapplicable here (see note 2 at pp. 9-10 above). Certainly the Commission's statement as to the meaning of its own decision in **Schwerman** is a persuasive answer to the attempt by appellants to read an utterly unsupportable meaning into that decision.

Appellants' contention that the Commission, in applying section 5, should distinguish between **kinds** of operating rights completely departs from precedent and logic. Under the Interstate Commerce Act, by explicit definition (section 203(16), 49 U. S. C. § 303(16)), a carrier is a carrier, regardless of its size, the extent of its rights, or the number of extensions of rights in the form of additional certificates and permits it may acquire. As the court below held, being a carrier by statutory definition since 1939, UPS could not **become** a carrier upon acquisition of the certificate here involved (J. St. 39-40). Hence, section 5 is not pertinent to the grant of this certificate to UPS.

Appellants' allegation of improper control with respect to the Ohio affiliate of UPS, which is based upon an earlier certificate case, is identical with the contention made here with respect to UPS, and is invalid for the same reason. There, as in this case, a contract carrier later acquired common carrier rights (in a proceeding that found its way to this Court which affirmed the grant of the certificate—**Railway Express Agency, Inc. v. United States**, *supra*, 355 U. S. 270 (1957). There, as here, it is clear that the grant of additional carrier authority to an existing carrier does not invoke section 5 of the Act.

Appellants acknowledge that UPS' Portland affiliate is operating pursuant to an order of the Commission issued in 1941, **United Parcel Service of Portland—Purchase—A. J. Wiese**, 37 M. C. C. 474 (1941); and its Pennsylvania affiliate is rendering service pursuant to an order of the Commission issued in 1938. **United Parcel Service of Penn-**

sylvania, Inc. Contract Carrier Application, 10 M. C. C. 83 (1938).

These Commission orders stand unimpeached in any direct proceeding. Appellants' contention that these 1941 and 1938 orders should have been conditioned on the parent corporation's (UPSA) becoming a formal party in each of those proceedings represents an improper collateral attack on those orders. The Commission's ruling that the legality of those orders may not be tested here is squarely in accordance with the decisions of this Court. **Callanan Road Improvement Co. v. United States,** 345 U. S. 507 (1953); **Venner v. Michigan Central R. R.,** 271 U. S. 127, 130 (1926).

Appellants' position below was based solely on the refusal of the Commission to grant appellants' motion for a stay of these proceedings pending determination of the complaint filed by appellants under section 5. That determination has now been made in a final order of the Commission in Docket No. MC-F-7321 (J. St. 51-52). Appellants have taken no appeal from that order. The final rejection of these allegations on the merits should be conclusive of the invalidity of appellants' collateral attack here.

2. There Was No Violation of Section 221(b).

Appellants have raised another technical issue by contending that the "order" of the Commission denying reconsideration could not take effect for 30 days from the time it was served on appellants. For support, appellants rely on section 221(b) of the Interstate Commerce Act, 49 U. S. C. § 321(b), which provides that all "orders" of the Commission should take effect within such reasonable time, not less than 30 days, as the Commission may prescribe.

Appellants have pointed to no decisional precedent whatsoever, and we have found none, to support their strained construction of section 221. Clearly, the provision relied on by appellants applies only to those orders of the Commission which determine issues raised in the hearings.

The report and order of the Commission, by Division 1, issued on June 3, 1959, is such an order, and the elapsed time until the certificate was issued to UPS on March 9, 1960, plainly fulfills all requirements under the statute. The three-judge district court has here so held (J. St. 42), and appellants have failed to demonstrate any defect whatsoever in the court's reasoning and conclusion on this point.

As a reading of the Commission's order of February 4, 1960, confirms, the denial of the petition for reconsideration did not prohibit any action, nor did it, of itself, permit any action. It merely removed the automatic stay or postponement of the effective date of the order, which is imposed by section 17(8) of the Act, pending disposition of the petition for reconsideration.[3] The order of the division is the operative order of the Commission, as section 17(4) specifically provides:

> "* * * any order, decision or requirement of a division * * * shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission."

Section 17(9) provides that when an application for "reconsideration of any decision, order, or requirement of a division" shall have been denied, a suit to enjoin or set aside that decision, order or requirement may be brought in the proper court. This provision, read in conjunction with section 17(8), makes it clear that the right of appeal lies from the order of the division authorizing the grant of authority, which became effective and appealable by the denial of the petition for reconsideration.

Appellants' highly technical argument on this issue thus amounts to no more than a contention that the issuance of the certificate should have been delayed for about two

3. The fact that the Commission might denominate the denial of a petition for reconsideration an "order" does not, of course, determine its legal status under the review and other procedural provisions of the statute. **United States v. Los Angeles & Salt Lake R. R.**, 273 U. S. 299, 309 (1927).

weeks. Even assuming, *arguendo*, that appellants are correct in their construction of section 221, which is contrary to established Commission procedure,[4] and contrary to the reasoned decision of the court below, it could result now only in requiring the Commission to perform the vain and useless ministerial act of reissuing a certificate to UPS, the 30 day period claimed necessary by appellants having long since expired.

3. The Commission's Detailed Findings of Convenience and Necessity and of Fitness and Ability Are Fully Supported.

Appellants also challenge the findings of fact which form the basis of the Commission's grant of a certificate of public convenience and necessity to UPS. Significantly, appellants do not dispute the finding that the principal medium for small package shipments prior to inauguration of UPS service was parcel post, and that in many important respects parcel post service is unsatisfactory, inconvenient and inadequate for commercial shippers (79 M. C. C. at 648-649, 651). Nevertheless, appellants would have the Court ignore the admitted deficiencies of parcel post and assume that the sole attraction of UPS' service is its low rates. Appellants also make the unwarranted assumption, which is directly contrary to the evidence, that appellants provide "the same service which United proposed" (J. St. 19).

These arguments were fully met and disposed of by the Commission.[4] And the court below, in rejecting these contentions, concisely stated the facts as follows (J. St. 31):

> "The evidence of the shipper witnesses, painstakingly reviewed in the report of Division 1, shows that UPS was offering not simply a cheaper but a

4. An established administrative practice, especially one of long standing, is entitled to great weight in construing both the administrative regulation and the enabling statutory provision. **Commissioner v. South Texas Lumber Co.**, 333 U. S. 496 (1948).

better mousetrap. It was better than parcel post because of the pickup, assured delivery times, repeated attempts to effect delivery and other features mentioned above. It was better than any service offered by existing motor carriers because although some of these carriers may have duplicated some particular feature of applicant's proposed service, none offered one so flexible and complete. * * *"

These arguments of appellants here are the same as those which were rejected by this Court in 1957 in a case involving the grant of similar authority (from Chicago to all or parts of five midwestern states), on a comparable, though shorter, record, to the United Parcel Service company operating in that area. **Railway Express Agency, Inc. v. United States**, *supra*, 355 U. S. 270, *affirming per curiam* 153 F. Supp. 738 (S. D. N. Y. 1957). Indeed, Railway Express Agency was also the appellant there, and it is pressing the identical claims here. In that earlier case, Circuit Judge Swan, speaking for the three-judge statutory court, disposed of these arguments as follows (153 F. Supp. at 741-742):

"* * * We think it apparent from the reports of the examiner and Division 1 that the certificate was granted to United Parcel on the basis of evidence showing a more efficient service, at a lower cost and of a type not presently offered to shippers."

That statement is equally applicable and appropriate here.

Appellants further contend that UPS failed to prove its ability to operate its service "at the level of rates proposed" (J. St. 18). This contention is merely another attempt indirectly to attack the tariff of UPS. In the 1957 United Parcel Service case, this Court affirmed the court below which held that such a collateral attack may not be made in a certification proceeding. **Railway Express Agency, Inc. v. United States**, *supra*. As in that earlier

case, the contention here is founded on the erroneous assumption that the Commission based its findings solely on some specific proposed level of rates. In a careful review of the evidence by the court below, it demonstrated that this is not the fact (J. St. 32).

With regard to UPS' ability to perform the proposed service, appellants have wholly ignored the detailed basis for the Commission's finding on this subject set forth in its report by Division 1 and in the subsidiary findings of the Examiner.[5]

Thus, for example, the Commission found that UPS and its affiliates "are thoroughly experienced in the transportation of small packages and have developed efficient and economical methods for the handling of such traffic" (79 M. C. C. at 656). The Examiner found that at the time of the hearing, in the identical operation in "the restricted area in and around New York", UPS "is making daily pickups from 1,400 shippers and is handling a daily volume of almost 16,000 packages" (Examiner's report, p. 8). The court below calculated from figures in the Record that in these operations, which were performed at rates similar to those proposed in the new service, UPS earned, in 1956, a profit of $76,066, and realized a "return of some 19% before income tax on its equity and advances from an affiliate" (J. St. 33). The Examiner also set forth in detail the financial assets of UPS and the nature and extent of equipment to be utilized in the proposed service (Examiner's report, pp. 9, 12-13, 64). None of those findings has been challenged by appellants.

Appellants have not only ignored the findings on which the grant of the certificate was based, but have also made the unwarranted assumption that the court below did not properly exercise its function of review. It is well settled

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5. The Commission adopted the facts stated by the Examiner (79 M. C. C. at 631); no exceptions were taken to those statements, and his report must therefore be considered together with the Commission's report.

that, since the order granting the certificate was within the Commission's statutory power, it may not be set aside unless it is clearly erroneous as a matter of law, or unsupported by any substantial evidence. **United States v. Pierce Auto Freight Lines, Inc.**, 327 U. S. 515, 535-536 (1946). Appellants do not deny that the ultimate findings required by law were explicitly made in terms of the statutory language. Furthermore, the comprehensive and careful report of the Commission clearly shows that full consideration was given to every fact made relevant by the applicable sections of the Interstate Commerce Act, and that the record of 7,021 pages and 550 exhibits, introduced in the course of 49 hearing days, contains ample evidence to support the findings.

The opinion below reflects an independent and diligent study by the court of the extensive record which presents convincing proof of the validity of the conclusions reached by the Commission.

4. The Authorization of Dual Operations Under Section 210 Was Proper.

Appellants also attack the order of the Commission on the ground that "In granting dual operating authority, the Commission made no finding that this would be consistent with the public interest and the National Transportation Policy nor was there any evidence adduced to support such a finding" (J. St. 21). Obviously, appellants overlooked the Commission's specific finding on this point (79 M. C. C. at 656):

> "• • • we conclude that the holding by applicant of the certificate sought and the holding by it and its affiliates of the permits heretofore issued to them will be consistent with the public interest and the national transportation policy."

The Commission reached this conclusion after consideration of voluminous evidence regarding the benefits

to the public resulting from the operation of both the contract carrier retail store delivery service and the proposed common carrier parcel delivery service of UPS. The Commission approved the requested dual authority, but only after it imposed a restriction in addition to the one proposed by UPS (79 M. C. C. at 655, 663). UPS had proposed that no service should be rendered under the certificate between department stores, specialty shops and retail stores, and their branches or warehouses, or between such stores, on the one hand, and, on the other hand, the premises of the customers of such stores. The Commission clearly was justified on the record in concluding that—with the addition of a further restriction against providing delivery service under the certificate to the premises of persons (department stores, specialty shops and retail stores) who are served as shippers by UPS pursuant to permits issued by the Commission—opportunities for discrimination are eliminated. In addition, the specific retention of jurisdiction by the Commission, a device frequently employed by the Commission in approving dual authority, provides a further and absolute safeguard (79 M. C. C. at 654-656).

Certainly the statute could not be more explicit in leaving approval of dual operations to the sound discretion of the Commission. Section 210, 49 U. S. C. § 310. In the light of the evidence and the restriction added by the Commission, there can be no possible question as to the propriety of the Commission's decision on this issue and the court below so held.

CONCLUSION.

The Commission in granting the certificate to UPS, and the court in sustaining that grant, have followed long standing and well recognized precedents. In refusing to accept any of appellants' novel departures from accepted practices and in determining in favor of UPS every issue advanced by appellants, the Commission and the court below acted under clear and established principles of law and practicality.

We respectfully submit, therefore, that appellants have not presented any substantial question for the decision of this Court, and the judgment of the court below should be affirmed.

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